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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
11

12 ALESSANDRO DIRIENZO, on behalf of
13 himself and all persons similarly situated,

14 Plaintiff,

15 vs.

16 DUNBAR ARMORED, INC.,

17 Defendant.
18

CASE NO. 09CV2745 DMS (JMA)

**ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS PLAINTIFF'S FIFTH
CLAIM FOR RELIEF**

[Doc. 10.]

19 Pending before the Court is Defendant's motion to dismiss Plaintiff's fifth claim for relief
20 pursuant to Federal Rule of Civil Procedure 12(b)(6). The matter came on for hearing on May 6, 2010.
21 Kyle Nordrehaug appeared on behalf of Plaintiff. Rene Thorne and Paul Sorrentino appeared on
22 behalf of Defendant. For the reasons set forth below, the motion is granted.

23 **I.**

24 **BACKGROUND**

25 Plaintiff Alessandro Dirienzo is former employee of Defendant Dunbar Armored, Inc. (FAC
26 ¶ 10.) Defendant provides security and armored truck services to businesses throughout the United
27 States. (*Id.* at ¶ 2.) Defendant employs Armored Car Drivers, Armored Car Guards, and other
28 Armored Car Personnel (collectively "Armored Truck Employees") who are responsible for the safe

1 delivery and pick-up of customer valuables or cargo and provide transportation via armored trucks.
2 (*Id.* at ¶¶ 3-4.)

3 Plaintiff was employed by Defendant as an Armored Truck Employee from November 2007
4 to October 2009. (*Id.* at ¶ 10) Plaintiff was a non-exempt employee and worked forty or more hours
5 each week. (*Id.*) During the course of that employment, Plaintiff incurred expenses for items such as
6 a gun, bullets, a bullet proof vest, firearm license, and gun holster. (*Id.* at ¶ 11.) Defendant did not
7 reimburse Plaintiff for the cost of those items. (*Id.*) Plaintiff also failed to receive meal periods and
8 rest periods as required by law, and did not receive certain wages due at the termination of his
9 employment. (*Id.* at 12.)

10 Plaintiff filed suit on behalf of himself and all Armored Truck Employees who were employed
11 by Dunbar in California for Defendant's alleged unlawful employment practices. (*Id.* at ¶ 14.)
12 Plaintiff's FAC alleges five claims for relief: 1) violation of California's Unfair Competition Law
13 ("UCL"), Cal. Bus. & Prof. Code § 17200, et seq.; 2) violation of Cal. Labor Code § 2802 for failure
14 to indemnify; 3) violation of Cal. Labor Code §§ 226.7 & 512 for failure to provide meal and/or rest
15 periods; 4) violation of Cal. Labor Code § 203 for failure to pay wages when due; and 5) violations
16 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132. Plaintiff also seeks
17 civil penalties as provided by the Labor Code Private Attorneys General Act, Cal. Labor Code § 2698
18 et seq.

19 At issue in the present motion is Claim 5, which seeks declaratory and equitable relief under
20 ERISA. Plaintiff alleges that Armored Truck Employees were eligible for ERISA benefits under
21 federal law but were wrongfully denied such benefits. (FAC at ¶¶ 58-59.) Plaintiff seeks a judicial
22 declaration of the rights of the parties, an order compelling production of Defendant's ERISA plan
23 documents, as well as injunctive and equitable relief. (*Id.* at ¶¶ 61-62.)

24 Plaintiff filed his complaint on December 8, 2009. (Doc. 1.) Following an informal
25 conference with the Court, Plaintiff filed a First Amended Complaint on February 18, 2010. (Doc. 9.)
26 Defendant filed the motion to dismiss on March 10, 2010. (Doc. 10.) Plaintiff filed an opposition,
27 and Defendant filed a reply. (Docs. 11 & 12.)

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1 II.

2 LEGAL STANDARD

3 In two recent opinions, the Supreme Court established a more stringent standard of review for
4 12(b)(6) motions. *See Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937 (2009); *Bell Atlantic Corp. v.*
5 *Twombly*, 550 U.S. 544 (2007). To survive a motion to dismiss under this new standard, “a complaint
6 must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on
7 its face.’” *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 570). “A claim has facial plausibility
8 when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the
9 defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). “Determining
10 whether a complaint states a plausible claim for relief will ... be a context-specific task that requires
11 the reviewing court to draw on its judicial experience and common sense.” *Id.* at 1950 (citing *Iqbal*
12 *v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007)). In *Iqbal*, the Court began this task “by identifying the
13 allegations in the complaint that are not entitled to the assumption of truth.” *Id.* at 1951. It then
14 considered “the factual allegations in respondent’s complaint to determine if they plausibly suggest
15 an entitlement to relief.” *Id.* at 1951.

16 III.

17 DISCUSSION

18 Defendant’s employee handbook sets out the requirements for obtaining employee benefits.
19 It provides, in pertinent part: “Individuals who have successfully completed their probationary period
20 and work more than 40 hours per week are eligible for a full-benefit employee classification. The
21 determining factor is the availability of a full-benefit employee slot.” (Employee Handbook 7-1.) The
22 handbook goes on to describe the factors involved in determining the number of full-benefit employee
23 positions available at each branch. (*Id.*) Additionally, in order to participate in Defendant’s 401(k)
24 plan, the handbook specifies that an employee must be 21 years of age, complete 1 year of service, and
25 work at least 1,000 hours within the employee’s anniversary year or subsequent calendar year. (*Id.* at
26 7-7.)

27 Plaintiff contends that the eligibility requirements for participation in Defendant’s plan violates
28 29 U.S.C. § 1052 (“Section 202”) because it effectively requires employees to work more than one

1 year to be eligible for full-time benefits and thus, it discriminates against new employees.¹ Plaintiff
2 further contends that Defendant has breached its fiduciary duty by misrepresenting the terms of
3 employee eligibility under ERISA and failing to provide plan documentation. (Pl. Opp’n. 5.) Based
4 upon these alleged violations, Plaintiff seeks equitable relief under 29 U.S.C. § 1132 (a)(2) and (a)(3)
5 (“Section 502”).² Defendant, on the other hand, contends Plaintiff’s claims are actually for benefits
6 under Section 502(a)(1)(B).³ Defendant argues that Plaintiff may not maintain an action under
7 Sections 502(a)(2) and 502(a)(3) when relief is available under Section 502(a)(1)(B). Defendant
8 further contends that Plaintiff has not properly alleged a claim for plan documentation or
9 misrepresentation.

10 **A. Section 502(a)(3)**

11 Plaintiff seeks a judicial declaration pursuant to Section 502(a)(3) that Defendant’s plan
12 eligibility requirements violate federal law. Section 502(a)(3) is a catchall provision which “act[s] as
13 a safety net, offering appropriate equitable relief for injuries caused by violations that section 502 does
14 not elsewhere adequately remedy.” *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996). Relief is not
15 “appropriate” under Section 502(a)(3) when Section 502(a)(1)(B) provides an adequate remedy.
16 *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475 (9th Cir. 1997); *see also Korotynska v. Metro. Life Ins.*
17 *Co.*, 474 F.3d 101, 106 (4th Cir. 2006) (“[T]he great majority of circuit courts have interpreted *Varity*
18 to hold that a claimant whose injury creates a cause of action under § 1132(a)(1)(B) may not proceed

20 ¹ Section 202(a)(1)(A) provides: “No pension plan may require, as a condition of participation
21 in the plan, that an employee complete a period of service with the employer ... extending beyond the
22 later of the following dates -- (i) the date on which the employee attains the age of 21; or (ii) the date
on which he completes 1 year of service.”

23 ² Section 502(a)(2) & (3) provide, in pertinent part: “(a) Persons empowered to bring a civil
24 action. A civil action may be brought ... (2) by ... a participant, beneficiary or fiduciary for appropriate
25 relief under section 409 [29 U.S.C.S. § 1109]; (3) by a participant, beneficiary, or fiduciary (A) to
26 enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to
obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions
of this title or the terms of the plan[.]”

27 ³ Section 502(a)(1)(B) provides: “(a) Persons empowered to bring a civil action. A civil action
28 may be brought – (1) by a participant or beneficiary ... (B) to recover benefits due to him under the
terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future
benefits under the terms of the plan[.]”

1 with a claim under § 1132(a)(3).”).

2 Defendant contends that Plaintiff’s claim for equitable relief under Section 502(a)(3) is, in fact,
3 a claim for benefits. Therefore, Defendant asserts that Plaintiff has an adequate remedy under Section
4 502(a)(1)(B) and cannot bring a claim under Section 502(a)(3). The Court agrees. Although Plaintiff
5 argues that he seeks only a declaration regarding the legality of the plan requirements, Plaintiff’s
6 central claim is that he was denied benefits. The FAC is replete with references to benefits, and
7 Plaintiff indicates that the result of a declaration in his favor will involve an IRS correction procedure
8 for missing enrollment in the 401(k) plan. (*See* FAC ¶¶ 1, 9, 59, 62; Pl. Opp’n. 6.) Plaintiff’s original
9 complaint also sought relief under Section 502(a)(1)(B), but Plaintiff later abandoned that claim
10 apparently because of his failure to exhaust administrative remedies. Plaintiff, however, cannot now
11 use Section 502(a)(3) to avoid administrative exhaustion requirements; the fact that Plaintiff may not
12 succeed in a claim under Section 502(a)(1)(B) does not render the claim inadequate. *See Katz v.*
13 *Comprehensive Plan of Group Ins.*, 197 F.3d 1084, 1089 (11th Cir. 1999) (“[T]he availability of an
14 adequate remedy under the law for *Varity* purposes, does not mean, nor does it guarantee, an
15 adjudication in one’s favor.”). Accordingly, Defendant’s motion to dismiss this aspect of Plaintiff’s
16 claim is granted.

17 **B. Section 502(a)(2)**

18 Initially, Defendant contends that Plaintiff’s Section 502(a)(2) claim fails for the same reason,
19 *i.e.*, because Plaintiff has an adequate remedy under Section 502(a)(1)(B), he cannot state a claim
20 under Section 502(a)(2). The Ninth Circuit, however, has held that a plaintiff with standing to bring
21 a claim under Section 502(a)(2) may do so even if relief is also available under Section 502(a)(1)(B).
22 *Harris v. Amgen, Inc.*, 573 F.3d 728, 735 (9th Cir. 2009). Thus, the Court declines to dismiss
23 Plaintiff’s Section 502(a)(2) claim on this ground.

24 Plaintiff’s Section 502(a)(2) claim, however, fails for other reasons. Plaintiff argues that
25 Defendant breached its fiduciary duty under 29 U.S.C. § 1109 (“Section 409”) by misrepresenting
26 Plaintiff’s eligibility for benefits and by failing to provide plan documentation. To the extent Plaintiff
27 alleges misrepresentation, the claim fails because Plaintiff does not allege detrimental reliance. *See*
28 *Harris v. Amgen, Inc.*, 2010 U.S. Dist. LEXIS 26283 (C.D. Cal. Mar. 2, 2010). To the extent Plaintiff

1 relies on Section 502(a)(2) as a way to obtain plan documentation, such reliance is misplaced.
2 Sections 502(a)(1)(A) and 502(c) address a plan administrator's failure to provide plan documents.⁴
3 Moreover, Plaintiff fails to allege he requested plan documents and that any such request was refused.
4 Accordingly, Plaintiff's Section 502(a)(2) claim is dismissed.

5 Defendant also raises other challenges to the FAC, including that Defendant's plan does not
6 violate Section 202, Plaintiff's Section 502(a)(2) claim fails because no loss to the plan is alleged,
7 Plaintiff lacks standing to seek injunctive relief, and trial by jury and compensatory damages are not
8 available under ERISA. The Court declines to reach these arguments, as the rulings above are
9 dispositive.

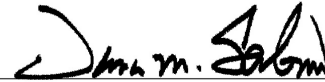
10 IV.

11 CONCLUSION

12 For these reasons, Defendant's motion is granted. Claim 5 of Plaintiff's First Amended
13 Complaint is dismissed without prejudice.

14 **IT IS SO ORDERED.**

15 DATED: May 12, 2010



17 HON. DANA M. SABRAW
18 United States District Judge
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22 ⁴ Section 502(a)(1)(A) provides: "(a) Persons empowered to bring a civil action. A civil action
23 may be brought – (1) by a participant or beneficiary – (A) for the relief provided for in subsection (c)
of this section"

24 Section 502(c) provides: "(c) Administrator's refusal to supply requested information; penalty
25 for failure to provide annual report in complete form. (1) Any administrator ... who fails or refuses
26 to comply with a request for any information which such administrator is required by this title to
27 furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably
28 beyond the control of the administrator) by mailing the material requested to the last known address
of the requesting participant or beneficiary within 30 days after such request may in the court's
discretion be personally liable to such participant or beneficiary in the amount of up to \$ 100 a day
from the date of such failure or refusal, and the court may in its discretion order such other relief as
it deems proper."